No. 13883

United States
COURT OF APPEALS
for the Ninth Circuit

LESLIE H. CHAPPELL,

Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF PLEADINGS AND JURISDICTION

The complaint was filed on September 7, 1951, in the Circuit Court of the State of Oregon for the County of Lincoln (R., pp. 3, 6). A petition for removal was filed in the United States District Court for the District of Oregon on September 15, 1951 (R., pp. 3, 12), on the basis that said controversy was between citizens of different states and exceeded the sum of $3,000, thus giving

said court jurisdiction (Title 28, U.S.C.A., §1332, and Title 28, U.S.C.A., §1441). On September 28, 1951, an answer was tendered and filed by appellee (R., p. 12). On September 23, 1952, appellee filed a motion for summary judgment (R., p. 15), and said motion was granted by a judgment order dated April 21, 1953 (R., p. 21). Thereafter a notice of appeal was filed by appellant on May 14, 1953 (R., p. 22), and this court has jurisdiction to hear said appeal under 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

The appellee owned and operated an establishment in Toledo, Oregon, engaged in manufacturing, loading, handling and changing lumber products (R., p. 7). In short, appellee operated a sawmill. Appellant was employed by the appellee principally as a spotter in the part of the mill known as a cargo slip (R., p. 7). In the performance of his duties, appellant was often on shore and occasionally worked exclusively on shore. He was a laborer and received the same scale of pay as the laborers who worked in other portions of appellee's lumber mill (R. pp. 16, 17).

On November 22, 1950, a barge was brought into the cargo slip at appellee's mill. On the dock a stack of lumber had been set on some blocks, and an overhead or monorail crane, which runs throughout appellee's mill (R., p. 28), was to pick the lumber off of said blocks and put it down on the barge. Appellant's duty was to set some blocks on the barge at the point where the lumber was to be placed (R., p. 7). Appellant set a pair

of blocks, and the monorail crane had placed a stack of lumber on the blocks. Appellant was walking away from the area when the tongs of the crane struck him on the back, causing permanently disabling injuries (R., pp. 8, 9, 10). Appellant brought an action against his employer for damages. Almost one year after filing an answer to the complaint, appellee moved for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure, on the basis that the Longshoremen's & Harbor Workers' Act, 33 U.S.C.A. 901, et seq., was the only remedy available to the plaintiff.

The question presented in this appeal is whether an employee of a lumber mill who was injured while on a barge over 18 tons in navigable waters on the premises of said mill is precluded as a matter of law from bringing an action based on negligence against his employer. Stating the same question in the reverse manner, is appellant's only remedy a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, supra? The order of the United States District Court for the District of Oregon is correct ONLY if

(1) It conclusively appears from the pleadings, depositions, affidavits and admissions that appellee had provided compensation as required by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., 901, et seq.,

AND

(2) It conclusively appears from the record that the only remedy available to the appellant is compensation under said Act.

SPECIFICATION OF ERROR

The District Court erred in granting appellee's motion for summary judgment.

ARGUMENT

Summary

I. From the record it does not appear that appellee has complied with the provisions of the Longshoremen's and Harbor Workers' Act, supra, and therefore an order rendering a summary judgment is erroneous.

II. The Longshoremen's and Harbor Workers' Compensation Act, supra, is not the only remedy available to appellant.

A. Historically, the legislation of an individual state can be applied to injuries on navigable waters if to do so does not work material prejudice to the characteristic features of the general maritime law.

(1) Congress has consistently sought to give the remedies provided by an individual state the widest latitude constitutionally possible.

B. A "twilight zone" exists wherein the injured party may, if he sees fit, seek a remedy provided by an individual state, even though the Longshoremen's and Harbor Workers'

Compensation Act, supra, might also be applicable.

(1) The work of appellant was within this twilight zone.

C. This action for damages is a proper remedy.

I. Compensation Has Not Been Provided by Appellee

Rule 56 of the Federal Rules of Civil Procedure provides that under certain conditions either party may move for a summary judgment. But the judgment shall only be rendered IF "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (Rule 56 (c), Federal Rules of Civil Procedure). Certainly it is not established by the record that appellee has secured compensation in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Title 33, U.S.C.A., Section 932 (a) of that Act, requires:

> "Every employer shall secure the payment of compensation under this chapter—
>
> "(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States

or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this chapter; or

"(2) By furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation and receiving an authorization from the Secretary to pay such compensation directly. . . ."

Title 33, U.S.C.A., Section 914 (a) of said Act, provides that compensation be promptly paid unless liability to pay is controverted, and Section 914 (b) requires that the compensation shall be paid on the 14th day following the injury.

Title 33, U.S.C.A., Section 934, of the said Act, requires that the employer post notices in conspicuous places if it has secured this compensation. The notice must state the name and address of the carrier; that the compensation has been secured, and the date of the expiration of the policy.

Title 33, U.S.C.A., Sec. 905, gives to an injured employee the right to maintain an action at law for damages "if an employer fails to secure *payment* of compensation as required by this chapter" (Italics ours).

It was undisputed that appellant never heard of the Longshoremen's and Harbor Workers' Compensation Act or its benefits until the motion for summary judgment was filed almost two years after the accident (R., p. 16). In other words, there were no notices posted and no payment of compensation was made or tendered.

Appellant alleged that on or about November 22, 1950, he received a permanent injury while in the em-

ploy of the appellee (R., pp. 7, 10). If appellee had fully complied with the provisions of the Longshormen's and Harbor Workers' Compensation Act, the record should show that payment of compensation had been secured for appellant. The record shows just the opposite. Therefore, on the face of the record now before this court, appellant has the right given to him by Section 905 of Title 33, U.S.C.A., of the Longshoremen's and Harbor Workers' Act to bring an action for damages against his employer.

II. The Longshoremen's and Harbor Workers' Compensation Act, Supra, Is Not the Only Remedy Available to Appellant.

A. Historical Summary

Section 8, Article I, of the Constitution of the United States, empowers Congress "to regulate commerce with foreign nations and among the several states."

Section 2, Article III of the Constitution, provides "that the judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction."

Congress, pursuant to these powers, passed the Judiciary Act of 1789, wherein Section 9 provides that the District Courts of the United States shall have exclusive original jurisdiction of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

The question of whether an individual state could provide a remedy for a person injured on navigable waters within that state received its first major consideration and determination in the United States Supreme Court in 1917 in *Southern Pacific Company v. Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, and culminated in 1942 with the decision of *Davis v. Department of Labor & Industries,* 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

The *Jensen* case is of course a landmark. The deceased was operating a small electric freight truck, unloading onto a pier the cargo of a ship owned by the defendant. In attempting to back into the hatchway of the ship, he struck his head and was killed. The widow of the deceased made claim to the Workmen's Compensation Commission of the State of New York, which allowed her an award of compensation. The Southern Pacific Company appealed this decision, and eventually the Supreme Court held that the New York Workmen's Compensation Act was inapplicable to this employee.

The Workmen's Compensation Act of New York, as interpreted by the state court, required that no ship could load or discharge cargo at the docks without penalty unless complying with the state Act (61 L. Ed. 1097). Justice McReynolds stated at p. 1098:

> "In view of these constitutional provisions and the Federal act, it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."

Therefore, since the general maritime law can be modified or affected to some extent, the problem became one of a standard test to determine the limits of such modification. The general test to be made was stated by Justice McReynolds as follows:

> "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony or general uniformity of that law in its international or interstate relations." (61 L. Ed. 1098)

In other words, the modification by state legislation is proper and constitutional unless it works material prejudice to the characteristic features of the general maritime law or interferes with the harmony and uniformity of that law. Because of the above provision of the Workmen's Compensation Act of New York, the court held that the necessary consequence of such provision would be destruction of the uniformity in respect to maritime matters which the Constitution was designed to establish and freedom of navigation between the states and foreign countries would be seriously hampered and impeded. Thus it was determined that the provisions of the New York Workmen's Compensation Act made too great a modification of the general maritime law, and under the facts before the Court at that time the state act was inapplicable to that employee.

In an attempt to put into statutory form what would or would not "work material prejudice to the characteristic features of the general maritime law" and with the

desire of removing uncertainty so that workers whose duties were partly on land and partly on navigable waters might be compensated for injuries, Congress passed an act five months after the Jensen decision, which stated ". . . save to claimant's rights and remedies under the workmen's compensation law of any state" (Approved October 6, 1917, ch. 97, 40 Stat. at L. 395 Comp. Stat. Sec. 991 (3), Fed Stat. Anno. Supp. 1918, p. 401). In other words, Congress attempted to make an addition to the savings clause, giving claimants who were injured under maritime circumstances the benefits of the workmen's compensation laws of the individual states. This was declared unconstitutional in *Knickerbocker Ice Company v. Stewart,* 253 U.S. 149, 64 L. Ed. 834, 40 S. Ct. 438, for the reason that it was beyond the power of Congress to sanction action by the states regarding rights, obligations and liabilities for injuries suffered while engaged in maritime employment.

In another attempt to solve the dilemma raised in the *Jensen* case, Congress passed the Act of June 10, 1922, ch. 216, 42 Stat. at L. 634, Comp. Stat., Sec. 991 (3), Fed. Stat. Anno. Supp. 1922, p. 225. In brief, this again was an attempt to broaden the savings clause to include rights and remedies under state workmen's compensation laws, but to exclude the master of a ship and members of a crew. In *Washington v. W. C. Dawson,* 264 U.S. 219, 68 L. Ed. 646, 44 S. Ct. 302, the Supreme Court stated that this did not obviate the objections and Congress had again exceeded its powers.

Finally, on March 4, 1927, Congress passed the Long-

shoremen's and Harbor Workers' Compensation Act, ch. 509, Sec. 1, 44 Stat. 1424, 33 U.S.C.A. 901, et seq. In so doing, Congress made clear its purpose: to make the federal law applicable to an individual fact situation ONLY IF workmen's compensation proceedings could not validly be provided by the state law. Title 33, U.S.C.A., Sec. 903 (a) reads:

> "Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

Leaving out the surplus words that do not affect the situation now before the court, said statute reads:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, . . . only . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

Therefore, if in any given situation the state could constitutionally provide workmen's compensation benefits, then the federal compensation law is not applicable to that situation.

Thus the Supreme Court of the United States first propounded a test to determine the applicability of state remedies to workers injured on maritime waters. Thereafter Congress attempted to give to the states the right to legislate in this same area, but such attempts were declared unconstitutional. Consistent with its previous

efforts to give the individual states the broadest possible coverage in this area, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, supra, which was specifically to apply only "if coverage . . . through workmen's compensation proceedings may not validly be provided by state law."

If the work in which appellant was engaged was of such an exclusively maritime nature that the state legislation would "work material prejudice to characteristic features of the general maritime law or interfere with the proper harmony or uniformity of that law", then workmen's compensation benefits by the State of Oregon could not validly be provided. However, if this particular work in which appellant was engaged at the time of the injury would not so interfere, then appellant may seek his remedy among those provided by the State of Oregon.

B. Rule of the Twilight Zone

Following the passage of the Longshoremen's and Harbor Workers' Compensation Act, there were a multitude of conflicting decisions on the question of whether an injured workman must seek his remedy exclusively within said Act, or whether he had a remedy constitutionally provided by an individual state. However, we feel it would be useless to discuss these decisions, for the Supreme Court of the United States in the case of *Davis v. Department of Labor & Industries of the State of Washington,* 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, has superseded such prior decisions and is the source to

which we must go to determine the present state of the law.

It is pertinent to thoroughly analyze the decision in the *Davis* case. The deceased was a structural steel worker, employed to help dismantle an abandoned drawbridge across a navigable river in the State of Washington. The steel was put in a barge and hauled away. Deceased was working on a barge examining the steel and cutting the pieces into proper lengths when he fell or was knocked into the river and drowned. Application was made by the widow to the Department of Labor & Industries of the State of Washington for compensation benefits and was denied by the State Supervisor, the Joint Board of the State Department of Labor & Industries, the State Superior Court and the State Supreme Court (Footnote, 87 L. Ed. 254). However, the Supreme Court of the United States reversed this judgment.

Justice Black first set forth the obvious purpose of Congress in passing the federal Longshoremen's and Harbor Workers' Act when he stated, at 87 L. Ed. 248:

> "Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law' ".

The court then stated that employees such as deceased occupy a "shadowy area within which, upon some undefined and undefinable point, state laws can validly provide compensation." (87 L. Ed. 248)

> "There is in the light of the cases referred to clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are as a matter of actual administration in fact protected under the state compensation act. *The yardstick to be used is the same yardstick created in the Jensen case. Does the state law interfere with the proper harmony and uniformity of maritime law?*" (87 L. Ed. 249) (Italics ours)

The court proceeded to discuss the actual impossibility for employees to determine with certainty before bringing action the factual question "Does applying the state law to their particular circumstances *interfere with the proper harmony and uniformity of maritime law?*" If the injured party, in attempting to make this determination, was in error, such party could easily suffer serious financial loss through the delay and expensive litigation and could very possibly discover that his claim had been barred by some statute of limitations (87 L. Ed. 249).

This reasoning is particularly pertinent to the case now before this court. Appellant was injured November 22, 1950 (R., p. 7). There is no contention that appellee was not notified. A complaint was filed on September 7, 1951 (R., p. 3), but the question now before us was not raised until September 23, 1952 (R., p. 15), almost two years after the injury. Appellant had never heard of the Longshoremen's and Harbor Workers' Compensation Act prior to the motion (R., p. 16). In other words, no notices that compensation had been secured under this law, as required by 33 U.S.C.A., 934, had been posted, and no compensation had been paid promptly

or within 14 days from the injury, as required by 33 U.S.C.A., 914. Nothing had been done, so far as dealing with the appellant was concerned, to comply with the requirements of the Longshoremen's and Harbor Workers' Compensation Act. It was for this reason that the Supreme Court of the United States in the *Davis* case stated:

> " . . . but the line separating the scope of the two (federal and state law) being undefined and undefinable with exact precision, marginal employment may by reason of particular facts *fall on either side.*" (Italics ours) (87 L. Ed. 250)

The fact that 33 U.S.C.A. 905 provides that the federal act is exclusive does not solve the problem, for, as the Supreme Court of the United States stated at 87 L. Ed. 250,

> "That section gains meaning only after a litigant has been found to occupy one side or the other of a doubtful jurisdictional line, and is no assistance in discovering on which side he can properly be placed."

This decision has again been considered by the Supreme Court of the United States on two occasions. In *Baskin v. Industrial Accident Commission, et al.,* 97 Cal. App. 2d 257, 217 P. 2d 733, affirmed 340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643, the California Court at first sought to distinguish the *Davis* case, but as a study of this litigation will show, the Supreme Court of the United States was very definite that *Davis v. Department of Labor & Industries,* supra, correctly states the law.

In the *Baskin* case the plaintiff was a materialman employed at a shipyard in California. Plaintiff was in-

jured while carrying planks, when he fell into the hold of a ship that was being repaired. The work on the ship was being done under a maritime contract (217 P. 2d 735). In the earlier decision, *Baskin v. Industrial Accident Commission, et al.,* 89 Cal. App. 2d 632, 201 P. 2d 549, the same court had held the *Davis* case was inapplicable because Davis was a structural steel worker employed by a contractor, while Baskin was a materialman employed by a shipyard (201 P. 2d 552). The Supreme Court of the United States granted certiorari in 338 U.S. 854, 70 Sup. Ct. 99, 94 L. Ed. 523, and remanded the cause once again to the California court, stating:

> "The petition for writ of certiorari is granted. It appears that the decisions of this Court in Bethlehem Steel Co. v. Moore, 335 U.S. 874, 93 L. Ed. 417, 69 S. Ct. 239, affirming the decision of the Supreme Judicial Court of Massachusetts, 323 Mass. 162, 80 N.E. 2d 478, was not available to the District Court of Appeal at the time of its consideration of this cause. The judgment is vacated and the cause remanded to the District Court of Appeal for reconsideration in the light of Bethlehem Steel Co. v. Moore (U.S.) supra, and Davis v. Department of Labor & Industries, 317 U.S. 249, 87 L. Ed. 246, 63 S. Ct. 225."

Thus a shipyard worker carrying planks aboard a ship, who fell in a hold of the ship, was permitted to enjoy the benefits of the state compensation act. Although the lower court distinguished the *Davis* case, the Supreme Court of the United States specifically remanded the case for a decision NOT distinguished from the *Davis* case. If a materialman employed by a shipyard carrying planks aboard a ship and falling into a hold is

in the twilight zone, certainly a laborer employed by a lumbermill who was merely placing a set of blocks on a barge is no less in the twilight zone.

Moore's case, 323 Mass. 162, 80 N.E. 2d 478; certiorari denied, *Bethlehem Steel Co. v. Moore,* 335 U.S. 874, 69 S. Ct. 239, 93 L. Ed. 417, is a recent case which further solidifies the decision in *Davis v. Department of Labor & Industries,* supra. Claimant was employed as a rigger in a shipyard. His work was variously on piers, dry docks and ships. A 475-foot tanker was towed to the shipyard for repairs and was tied to a floating drydock at the time of the accident. Claimant slipped on the step of a gun mount, and the injuries resulting gave rise to the litigation. Claimant sought compensation under the Workmen's Compensation Law of the state of Massachusetts, and the question was whether he was precluded because it was a maritime injury. The court, at 80 N.E. 2d 479, declared that under earlier decisions of the Massachusetts state court and of the United States Supreme Court claimant would undoubtedly be precluded from obtaining compensation in any manner other than under the Longshoremen's and Harbor Workers' Compensation Act. However, the decision of *Davis v. Department of Labor & Industries,* supra, completely altered the law on this point.

> "But the situation was definitely altered by the decision of the Supreme Court of the United States in Davis v. Department of Labor & Industries of Washington, 317 U.S. 249, 63 S. Ct. 85, 87 L. Ed. 246, written by Mr. Justice Black in 1942. . . . The significance of the case, however, lies in its obvious attempt to set up a means of escape from the diffi-

culties involved in drawing the line between state and federal authority under the doctrine of the Jensen case." (80 N.E. 2d 480)

. . . . .

"The decision does not overrule the Jensen case. It does, however, at least as appraised by Mr. Justice Frankfurter who concurred in it and by Chief Justice Stone who dissented from it, create a 'twilight zone,' or an area of doubt within which the two acts overlap and the injured workman may recover under either of them." (80 N.E. 2d 480)

"Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic' and to regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and designed to include within a wide circle of doubt all waterfront cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other."

This decision was found to be correct by the Supreme Court of the United States, for in refusing certiorari it referred specifically to the *Davis* case as the authority for refusing the certiorari.

It should be noted in analyzing these two cases whose result depends on the *Davis* decision, that the refusal to apply the state compensation act was reversed by the Supreme Court of the United States and the *Davis* case cited as the reason, while the decision permitting the

application of the state compensation act was affirmed and the *Davis* case again cited as the reason.

When compared to the activities of the claimants in the above cited cases, appellant's activities were clearly within the twilight zone. In *Davis v. Department of Labor & Industries,* supra, the deceased was actually working on the barge, cutting and sorting steel from a dismantled bridge. Appellant's sole duty was to place a pair of wooden blocks; *this he had already completed;* and was walking away at the time of the accident (R., p. 7). In *Baskin v. Industrial Accident Commission, et al.,* supra, claimant was a materialman actually transporting planks on a ship at the time he was injured. The claimant in *Moore's* case, supra, was a rigger whose occupation necessitated his frequently going aboard and working on ships. In both of the last cited cases the employer was a shipyard, while appellant's employer is a sawmill. It has been determined by the Supreme Court of the United States that a sawmill employing men exclusively on navigable waters has only an incidental relation to navigation and commerce so far as those men are concerned and does not impinge on the admiralty and maritime jurisdiction.

Sultan Railway & Timber Company v. Department of Labor & Industries of Washington
and
Eclipse Mill Company v. Department of Labor & Industries of Washington,
277 U.S. 137, 48 S. Ct. 505, 72 L. Ed. 820.

Both cases were heard together. The question presented was whether an order by the Department of

Labor & Industries requiring the employers to report the number of men so employed, the wages paid to them, and requiring payments to the State Workmen's Compensation fund was invalid because it conflicted with the Constitution and laws of the United States, in that it impinges on the admiralty and maritime jurisdiction of the United States.

One employer conducted a logging operation and employed the men in question to put sawlogs that were already in a navigable river into booms so that they could be towed elsewhere for sale; the other employer operated a lumber mill on the banks of a navigable river and employed the men in question to take booms apart before the logs entered the mill. The court said, at 72 L. Ed., page 821:

> " . . . In both instances the place of work is on navigable water—in one it is done before actual transportation begins and in the other, after the transportation is completed.
>
> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

C. Remedy Sought Is Proper

Appellant brought an action directly against his employer for damages. It may be contended that no workmen's compensation proceedings are provided by state

law for this appellant, and that therefore his only remedy is found in the provisions of the Longshoremen's and Harbor Workers' Compensation Act, supra. In the first place, the Longshoremen's and Harbor Workers' Act, supra, is applicable only if "workmen's compensation proceedings MAY not validly be provided by state law." It is not applicable merely because such proceedings ARE not available. If the state MAY constitutionally provide such proceedings, the Longshoremen's and Harbor Workers' Compensation Act is not applicable and the remedy provided by the state is proper so long as it does not work material prejudice to the characteristic features of the maritime law. Secondly, appellee IS attempting to use one of the workmen's compensation proceedings provided by the State of Oregon.

The State of Oregon, of course, does have a Workmen's Compensation Act that is applicable in this case. (O.C.L.A. 102-1701 et seq.) Section 102-1712, O.C.L.A., provides that "all persons, firms and corporations engaged as employers in any of the hazardous occupations hereafter specified shall be subject to the provisions of this Act. . . ." Operating a lumbermill is described as a hazardous occupation in Section 102-1725 (c), O.C.L.A. Therefore, appellant was an employee in a hazardous occupation and his employer is subject to the provisions of the Workmen's Compensation Act.

Even though this employer is subject to the provisions of the Workmen's Compensation Act, it may avoid certain obligations and lose certain benefits by filing a written notice of rejection with the Commission (Sec.

102-1712, O.C.L.A.), which privilege was exercised by this employer. However, even though such a rejection notice is filed, the employer is always subject to the provisions of the Act, even if to a lesser extent. Proof of this is contained in Section 102-1713, O.C.L.A., which takes from employers who have filed such an election the common law defenses and such employers may be sued directly. It is this section that gives appellant the right to bring the action now before this Court. By filing the notice of rejection, the appellee is not required to contribute any sum into the industrial accident fund, but if negligent, must answer in damages to the injured person and does not have certain defenses available to it.

The Longshoremen's and Harbor Workers' Compensation Act is applicable only if "recovery for disability through workmen's compensation proceedings may not validly be provided by state law." Such proceedings were validly provided by state law, and appellant is claiming damages under one of the proceedings so provided.

Even if no such proceeding was made available to the appellant by the Workmen's Compensation Act, this action would be a proper one since the very wording of the Longshoremen's and Harbor Workers' Compensation Act limits the exclusive applicability of that Act to a situation where no state compensation law could apply, and since from the cases above cited, it is clear that a state compensation law could apply to this situation the federal act is not then the only remedy applicable.

In Oregon an employer is given his choice of whether or not he wishes to contribute to the state accident fund. If he chooses not to so contribute, all employees are deprived of benefits available under the Workmen's Compensation Act of this state, but are given certain advantages set forth above in bringing an action for damages against the employer. Surely the employer cannot reject the Workmen's Compensation Act and thereby deprive the employees of compensation benefits under said Act and by the same rejection deprive the employees of a right to bring an action for damages which is specifically given by the same Act.

CONCLUSION

1. In a much disputed decision the Supreme Court of the United States held in *Southern Pacific Company v. Jensen,* supra, that a remedy provided by a state is inappropriate if it works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law.

2. Congress attempted twice to adopt a statute permitting state workmen's compensation laws to apply to injuries occurring on navigable streams; such statutes were declared to be too broad and interfered with the above test laid down in the *Jensen* case.

3. Congress finally passed the Longshoremen's and Harbor Workers' Compensation Act, which limited the applicability of the federal law as compared to state remedies as much as it possibly could.

4. The Davis case has settled the conflicting cases that arose following the passage of the Longshoremen's and Harbor Workers' Compensation Act by again applying the rule set forth in the Jensen case.

Thus, the present state of the law is:

(a) If the injury is caused by a tort occurring on navigable waters on a vessel exceeding 18 tons and to apply a remedy provided by a state would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity

of that law, then the only remedy is the Longshoremen's and Harbor Workers' Compensation Act.

(b) If the injury occurred on shore, of course the remedies provided by the state would be the only ones available.

(c) If the injury occurred on navigable waters but to apply a state remedy would not work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law, then a "twilight zone" exists and the injured party may seek the remedy in either area.

5. The remedy sought by appellant is a proper one and validly provided for by the Workmen's Compensation Act of the State of Oregon.

For the reasons set forth above, we ask this Court to absolve the order granting the summary judgment and remand the case to the United States District Court for the District of Oregon for trial.

Respectfully submitted,

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Attorneys for Appellant.